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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

Office-Supreme Court, U.S.
FILED
MAR 10 1967
JOHN F. DAVIS, CLERK

October Term, 1966

No. 1137

EARL LATSHA LUMBER COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Earl Latsha Lumber Company[1] petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Third Circuit entered in the instant case on October 27, 1966.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit has not been reported to date.[2] The decision and order of the National Labor Relations Board[3] is reported at 154 N.L.R.B. 30.[4]

Nine copies of the Joint Appendix are filed herewith.

The Trial Examiner's decision and Order of the Board appear at J.A.5.

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[1] Hereinafter called the Petitioner.

[2] The opinion is reproduced in Appendix A, infra.

[3] Hereinafter called the Board.

[4] Reference to portions of the testimony, exhibits, formal papers, including the findings of facts, conclusions of law and order of the Trial Examiner and of the Board printed as the Joint Appendix to the briefs of the parties and the Court below, are designated by their appropriate page number in the Joint Appendix preceded by "J. A.".

JURISDICTION

The opinion and judgment of the Court below were entered on October 27, 1966. On December 21, 1966, a decree enforcing the order of the Board was entered.[5]

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1). The jurisdiction of the Court below and of the Board rested on 29 U.S.C. Sec. 160.

QUESTIONS PRESENTED

1. Did the failure and refusal of the Board to grant petitioner's request for oral argument before said Board constitute a denial of due process in that Petitioner was thereby deprived of a fair and full hearing, and did the Court err by decreeing enforcement of a decree and order arising out of such proceedings?

2. Did the Court below err in failing to apply the rules pertaining to management's right to master its own business affairs as established in the case of *National Labor Relations Board v. Birmingham Publishing Company*, 262 F. 2d 2 (5th Cir. 1958) and *National Labor Relations Board v. McGahey*, 233 F. 2d 406, (5th Cir. 1956) and further in failing to analyze the evidence in accordance with the substantial evidence test set forth in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, as amplified in *National Labor Relations Board v. Park Edge Sheridan Meats, Inc.*, 341 F. 2d 725 (2nd Cir. 1965)?

STATUTES INVOLVED

The relevant statutory provisions are Sections 7, 8(a)(1), and (3), and 10(e) of the National Labor Relations Act as amended,[6] (29 U.S.C. Sec. 151 et seq.) and the Fifth Amendment to the United States Constitution.[7]

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[5] Reproduced in Appendix A.

[6] Hereinafter called the Act.

[7] These provisions are all set forth in Appendix B, *infra*.

STATEMENT

The Board filed with the Circuit Court of Appeals for the Third Circuit, pursuant to Section 10(e) of the Act, for enforcement of its order issued against Earl Latsha Lumber Company on August 12, 1965, and petitioner filed a Petition to Review and set aside the same order with said Court.[8] The Board had found that the petitioner[9] had violated Section 8(a) (3) and (1) of the Act by discharging six employees[10] because they had signed union authorization cards. The Board also found that the company violated Section 8(a) (1) of the Act by interrogating employees as to whether they and others had signed union cards, by threatening to shut down should the employees organize and by discharging employee, Elwood Dietz, in the presence of other employees because of his activities on behalf of the union.[11] The Circuit Court of Appeals decreed enforcement of the decision and order of the Board. Such findings together with the Order of Court based thereupon are not substantiated by the evidence.[12]

Early in September of 1964, the Company was the subject of an audit by the Wage and Hour Division of the United States Department of Labor and Industry. Mr. Rushin was the auditor in charge of the inquiry (J.A. 100a). Conferences were held between Mr. Rushin and Earl Latsha[13] in conjunction with the audit during the course of which Mr. Rushin advised the president of the Company that there would be additional requirements imposed with regard to payments for overtime since the law accelerated

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[8] The Court ordered the two cases consolidated.

[9] A company engaged in the retail sale and distribution of lumber and building materials, near Harrisburg, Pennsylvania.

[10] Donald Reichenbach, Clair Swartz, Bright Dietz, Elwood Dietz, Willis Weaver and Owen Gephart.

[11] Local 766 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[12] All events occurred in 1964 unless otherwise noted.

[13] President of Earl Latsha Lumber Company, petitioner herein.

employers' obligations as of September 3rd (J.A. 100a, 101a) for employers engaged in the type of business herein considered. In view of this Mr. Latsha decided that economy moves would have to be made in order to maintain the Company at its present level of productivity.

On September 17th Earl Latsha arrived at the Company's place of business early in the morning in order to apprise the men of the situation. Although meetings were not held on a regular basis, it was not unusual for gatherings of this type to be called when business had to be discussed (J.A. 85a).

At approximately 7:15 A.M. (J.A. 58a, 70a) Mr. Latsha began to address the men. He advised them of the new overtime requirements (J.A. 102a), that it would be necessary for them to be more careful in their work and that they apply themselves with a little more diligence (J.A. 105a, 148a). During the course of the discussion he advised Elwood Dietz that he was discharged (J.A. 58a, 101a, 102a). To this extent the testimony of all concerned is undisputed.

Immediately following the meeting Mr. Latsha took steps to cut down the work force in order to maintain the Company's business operation at its then present level. This was done in the light of the information supplied to the employer by the Wage and Hour Bureau (J.A. 101a).

Mr. Latsha began cutting the work force. As indicated above, Elwood Dietz was the first to be notified. There had been complaints by customers as to the service rendered by this former employe (J.A. 102a, 125a, 126a, 128a, 136a). His duties included waiting on customers in the yard when they would come to pick up supplies. On one occasion this former employe actually spoke discourteously to a customer, Mr. Trumbo (J.A. 127a). These instances were reported to the Company (J.A. 126a, 128a, 130a, 136a). In addition to these complaints Elwood Dietz' performance as a worker was very bad (J.A. 120a, 121a, 153a). He had received several reprimands (J.A. 103a). He was caught loafing on several occasions (J.A. 103a).

Donald Reichenbach was a part of the crew about whom complaints were received (J. A. 121a, 127a, 136a, 137a). The performance of this whole crew was below par. Reichenbach was likewise caught loafing and sleeping in the yard and warned about his poor work performance (J. A. 85a, 103a). For these reasons he became one of those released and was discharged following the meeting (J.A. 84a).

Clair E. Swartz was the third member of this crew (J.A. 121a). In May of 1964 it became necessary for him to take over the duties of operating a 295 acre farm (J.A. 94a). As a result of those responsibilities Swartz was not able to work Saturdays at the lumber yard. Saturday morning was a part of the regular work week (J.A. 66a, 95a, 104a, 105a,). Swartz was well warned to the effect that he would be laid off if he did not fully accept the working obligations (J.A. 96a).

Aside from the problem of Saturdays these extra curricular responsibilities also interfered with his general work performance (J.A. 103a, 104a). The warning was not heeded and the consequence followed as indicated.

Willis Weaver was released as a part of the economy measure described (J.A. 65a). Typical of his work performance and his job responsibility was the fact that this employe was not even at work on the day that he was released (J.A. 65a). This employe likewise, according to his own admission, would not work on Saturdays as required (J.A. 65a). Management had warned him about this (J.A. 66a). His work at the Verhovay Club as a bartender (J.A. 66a) further cut into his efficiency.

Owen Gephart, too, had secondary employment. He worked at Guy Miscia's Amoco Gas Station (J.A. 78a) five (5) nights per week. For this reason he was ferreted out, since the employer reasoned that with the supplementary occupation Gephart could take care of himself better than someone without any outside income (J.A. 105a).

REASONS FOR GRANTING THE WRIT

1. *The practice of the National Labor Relations Board in denying requests for oral argument before said Board constitutes a denial of due process in that Petitioner is thereby deprived of a fair and full hearing, and the Court erred by decreeing enforcement of a decree and order arising out of such proceedings.*

On June 2, 1965, the Trial Examiner's decision in the case was issued, which decision was adverse to the position of the Company. Company then proceeded to file exceptions to the decision, together with a request for oral argument (J.A. 41a), on June 22, 1965, both of which were filed in time and neither of which could have been filed prior to that date by reason of the chronological development of the proceedings. At the time of the preparation of the brief and of the exceptions, Company had no way of knowing whether or not its request for oral argument would be granted or denied and, therefore, whether or not the preparation of the brief should contemplate that it would be used in conjunction with argument or whether it would have to stand by itself. On August 12, 1965, the National Labor Relations Board issued its decision and order, and in a footnote to the decision Company's request for oral argument was denied (J.A. 3a).

". . . (A) hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." *Londoner v. Denver*, 210 U.S. 373, 386. Although an opportunity to submit written objections and complaints to the tax board in the case cited was given, the court held, "But we think that something more than that . . . is required by due process of law." (page 386).

"A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety from the standpoint of justice and law, of the

steps to be taken." *New England Divisions Case*, 261 U.S. 184, 200.

In opposition to this position counsel for the Board has cited and argued the following authorities: *Morgan v. United States*, 298 U.S. 468; *Federal Communications Commission v. WJR Station*, 337 U.S. 265, among others.

The *Morgan* case, aside from the proposition quoted by counsel for the Board that, "Argument may be oral or written. The requirements are not technical . . ." goes on to say in the next sentence, "But there must be a hearing in a substantial sense." (page 481). Parenthetically, oral argument actually did take place in *Morgan* and the court ended up by reversing the administrative determination on another issue.

National Labor Relations Board v. Mackay Co., 304 U.S. 333, is often cited in support of the denial of oral argument. It holds, "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights." (page 351). Petitioner does not dispute this principle of law. Rather, our position is merely that in the particular case now hearing the denial of oral argument under the circumstances of the proceedings abridges those rights.

Federal Communications Commission v. WJR Station, supra, is distinguishable from the case at bar in that it arose under a petition for a rehearing on a legislative administrative determination rather than under a judicial one. The circumstances of that case required no hearing whatsoever under the particular proceedings involved at that particular stage. However, the court in the *WJR* case was careful to point out at page 277 that, ". . . it follows that we should not undertake in this case to generalize more broadly than the particular circumstances require upon when and under what circumstances procedural due process may require oral argument. That is not a matter, under our decisions, for broadside generalization and indiscriminate application. It is, rather, one for case-to-case determination, through which alone account may be taken of

differences in the particular interests affected, circumstances involved, and procedure prescribed by Congress for dealing with them."

Petitioner was granted an opportunity to present oral argument before the Trial Examiner immediately following the conclusion of testimony, pursuant to Section 102.42 of the Board's Rules and Regulations, 1 CCH Labor Law Reporter, Section 1115.42. However, such argument must be presented without an opportunity to analyze the testimony presented. In view of the fact that the testimony in the case now hearing was compressed into a long one-day sitting, argument of this nature becomes even less significant. Furthermore, such argument is before the Trial Examiner and not before the Board, the latter of whom has the ultimate responsibility for making the decision.

It is admitted that various Courts of Appeals have held that oral argument before the Board is not a requirement of due process in the type of proceedings now hearing. *N.L.R.B. v. Clausen*, 188 F. 2d 439, 444 (3rd Cir. 1951), cert. denied, 342 U.S. 868; *N.L.R.B. v. Allied Distributing Corporation*, 297 F. 2d 679, 680 (10th Cir. 1961).

Your Honorable Supreme Court, it is respectfully submitted, has gone so far as to hold that oral argument is not necessary if not requested. *Consolidated Edison Company of N.Y. v. N.L.R.B.*, 305 U.S. 197. However, Petitioner's research on the subject has revealed no instance where your Honorable Court has squarely decided the issue as to whether or not oral argument, where requested, is required in order that a full and fair hearing may be had with the type of procedure outlined herein.

The basic objection to the procedure precluding oral argument before the body which makes the ultimate decision in the case is the fact that the advocate never faces the body which decides. ". . . The one who decides must hear." *Morgan v. U.S.* 298, U.S. 468, 481.

The shortcomings of oral argument before a hearing examiner are vividly pointed out by the following excerpt written as criticism of similar administrative processes

with uncanny application to the procedure presently employed by the Board: "The public official is not independent. As a civil servant, he is liable to be dismissed at any time without notice, and without any enforceable right to compensation. One would have thought it perfectly obvious that no one employed in an administrative capacity ought to be entrusted with judicial duties in matters connected with his administrative duties. The respective duties are incompatible. It is too much to expect in such circumstances that he should perform the judicial duties impartially. Although he acts in good faith, and does his best to come to a right decision, he cannot help bringing what may be called an official or departmental mind, which is a very different thing from a judicial mind, as everybody who has had any dealings with public officials knows, to bear on the matter he has to decide. More than that, it is his duty, as an official, to obey any instructions given him by his superiors, and, in the absence of special instruction, to further what he knows to be the policy of his Department. His position makes it inevitable that he should be subject to political influences." Lord Chief Justice Hewart, the New Despotism 46 (1929) was quoted in 37 Michigan L. Review, Page 604, footnote 28.

Oral argument limited to only the initial stage before the examiner does not satisfy the requirements of due process.

2. *The Court below erred in failing to apply the rules pertaining to management's right to master its own business affairs as established in the cases of* NATIONAL LABOR RELATIONS BOARD v. BIRMINGHAM PUBLISHING COMPANY, *262 F. 2d 2 (5th Cir. 1958) and* NATIONAL LABOR RELATIONS BOARD v. MCGAHEY, *233 F. 2d 406, (5th Cir. 1956) and further in failing to analyze the evidence in accordance with the substantial evidence test set forth in* UNIVERSAL CAMERA CORP. v. NATIONAL LABOR RELATIONS BOARD, *340 U.S. 474.*

As amplified in *National Labor Relations Board v. Park Edge Sheridan Meats, Inc.*, 341 F. 2d 725 (2nd Cir.

1965), ". . . (T) he standard for review is a shade more liberal than that for examining a jury verdict, although less liberal than that for examining the findings of a judge. *(Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474, 493, 71 S. Ct. 456, 477-491 . . .) *National Labor Relations Board v. Park Edge Sheridan Meats, Inc.,* 341 F. 2d 725, 729 (2nd Cir. 1965)". Applying this well accepted standard to the case at bar the decision of the National Labor Relations Board should be reversed and enforcement denied.

It is respectfully submitted that the Honorable Court below did not properly apply this well accepted test. A proper examination of the record readily reveals that the evidence submitted on behalf of the Board was inconsistent, contradictory and fails to form a proper basis for enforcement against petitioner, since the Board's findings and conclusions are erroneous. Enforcement should have been denied and petitioner's appeal allowed.

The dischargees testified that during the week of September 14th an attempt was made to secure signatures among the employes of Earl Latsha Lumber Company for Local 776, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. There was no testimony to the effect that the employer was aware of this effort except to the extent from which implications might be drawn from what is *alleged* to have happened at the meeting which took place on September 17th.

Complainants testified that during the course of Earl Latsha's comments at that meeting in question he discussed the fact that the Union was trying to get in and that he made threats in response thereto. It must be kept in mind that all of this testimony came from the dischargees—men who have a direct financial interest in the outcome of the proceedings. Witnesses for the Company by their testimony contradicted that anyone was asked at the time whether or not they signed a union card, (J.A. 115a 118, 141a)

or the fact that any statements about the union were made (J.A. 101a, 105a, 144a, 147a, 148a, 149a, 151a).

Where there is a dispute in the testimony it becomes a matter of credibility. It should be noted at this point that the employer's position is substantiated by two men in an unusual position. One is William Weaver, brother of one of the dischargees; the other is Leroy George, one of those who signed a union card. In view of these circumstances it is Respondent's position that this testimony is entitled to great weight and due consideration.

With regard to alleged statements about the union, the testimony presented by the dischargees is contradictory, inconsistent and unrealistic. It cannot conceivably measure up to the requirement of substantial evidence. Elwood Dietz testified that at the meeting Earl Latsha told him that he was discharged but failed to give him any explanation (J.A. 58a). He went on to describe some alleged preposterous discussion about a threat to the effect that employes would have to buy stock in the Company if the union got in (J.A. 59a).

Owen Gephart has a different version of what took place. With great enthusiasm he testified that at the meeting Mr. Latsha pointed to Elwood Dietz and is alleged to have said "You're the S. O. B. that started this thing" (J.A. 71a, 76a). Elwood Dietz' testimony does not substantiate any such statement. Rather, it contradicts it. The subject of any such remarks had they been made would certainly recall them vividly. All Elwood Dietz seems to have recalled was his feeling of surprise and his inquiry of the reason for his being fired (J.A. 58a, 59a). If, as testified by Gephart, such a statement had been made, there would have been no reason for inquiry—the motive would have been obvious.

Donald Reichenbach's testimony further contradicts the alleged statement "You're the S.O.B. that started this thing" described by Gephart. Reichenbach stated that he recalled no such statement (J.A. 86a). Furthermore, his

testimony contradicts that anything was said about stock (J.A. 86a). Clair Swartz' testimony likewise contradicts the "instigator statement" (J.A. 94a).

The Trial Examiner in his findings stated that with regard to this matter "I credit the testimony of Dietz, Rheinchenbach (Reichenbach), Weaver and Gephart as they impressed me as being more forthright and trustworthy witnesses . . ." (J.A. 10a). It is respectfully submitted that it is impossible to credit the testimony of the four of the witnesses since Gephart's testimony was completely contradictory to the testimony of the other three with regard to what transpired at the time of Elwood Dietz' alleged dismissal. Furthermore, Weaver was not even present on the morning in question.

The testimony is further inconsistent with regard to threats which were alleged to have been made by Mr. Latsha. Clair Swartz in describing the meeting stated that Mr. Latsha said "There would be no union get in there; he would close the gates before he would let the union get in. . . ." (J.A. 91a). Owen Gephart, for all of his enthusiasm, does not corroborate the alleged threat to close the operation if the yard were unionized (J.A. 71a). Neither does Elwood Dietz. Dietz stated ". . . he started in on the union subject . . . *he didn't talk very much about that* (Italics supplied for emphasis) until he picked me out of the crowd. . . ." Again it seems logical that one so directly involved would have had more of a vivid recollection of details had they in fact occurred (J.A. 58a). Reichenbach's recollection inconsistently falls somewhere in the middle when he states ". . . he said that if he would have to have a union, he would close" (J.A. 82a). These various recollections place grave doubt concerning the occurrence of any statement whatsoever in respect to a union.

There was further testimony of discussions which were alleged to have taken place following the meeting (J.A. 73a, 74a). It was testified that Mr. Latsha asked various employes whether they signed union cards, who signed union cards, etc. Owen Gephart testified that he was subjected to extensive interrogation on this subject (J.A. 73a,

74a). He indicated that Mike Margio and Lee Latsha were present when he was subjected to this questioning (J.A. 73a, 74a). However, they denied hearing any such conversation (J.A. 115a, 118a). He further indicated that Elwood Dietz was present while he was being questioned, but there was no corroborating testimony in this regard by that extremely partisan witness.

Specifically with regard to the statements of Bright Dietz, the testimony of this witness sheds no light on the situation one way or the other. He is not clear as to what he heard or what he did not hear at the meeting (J.A. 97a, 98a). He testified as to a conversation concerning the union with Mr. Latsha, but the circumstances surrounding that conversation and therefore its occurrence were contradicted (J.A. 141a). Furthermore, this particular employe was not actually discharged and therefore his presence and position presented at best an ambiguous situation.

Moreover, the position of the employer is that the discharges which took place occurred as a result of additional economic burdens imposed upon the Company by reason of increased financial responsibility arising out of the Federal Wage and Hour Law. The fact that such increased payments were necessary was conveyed to the President of the Company during the period immediately prior to the period of time which is the subject of this action. As a result of this accelerated overtime requirement the employer made certain decisions. Whether these decisions were sound business decisions is a question beyond the scope of the Board's inquiry.

The National Labor Relations Act does not interfere with the normal exercise of the right of the employer to select its employes or to discharge them.

"The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in the terms of its reasonableness. If the discharge was excessively harsh, if lesser forms of discipline would have been adequate, if the discharged employe was more, or just as, capable as the

one left to do the job, or the like then, the argument runs, the employer must not actually have been motivated by managerial consideration, and (here a full one hundred eighty degree swing is made) the stated reason thus dissipated as pretense, naught remains but anti-union purpose as the explanation. But as we have so often said: *Management is for management* (emphasis is supplied). Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: It may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids . . ." *National Labor Relations Board v. McGahey*, 233 F. 2d 406, 412, 413 (5th Cir. 1956).

"If a man has given his employer just cause for his discharge, the Board cannot save him from the consequences by showing that he was pro-union and his employer anti-union. . . . (T)he Company has a right to operate its plant efficiently. If an employe is both inefficient and engaged in union activities, that is a coincidence that does not destroy the just cause for his discharge. . . ." *National Labor Relations Board v. Birmingham Publishing Company*, 262 F. 2d 2, 9 (5th Cir. 1958).

The fact is that the employer made up his mind to economize in order to maintain the business at its present level and that several men were chosen to be discharged for the reasons outlined above. This is within the employer's prerogative.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

LOUIS J. ADLER
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15912

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

EARL LATSHA LUMBER COMPANY

No. 15960

EARL LATSHA LUMBER COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Petitions for Enforcement and Review of an Order of the National Labor Relations Board

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Argued October 18, 1966

Before Maris, McLaughlin and Kalodner, *Circuit Judges.*

OPINION OF THE COURT

(Filed October 27, 1966)

Per Curiam:

These are petitions by the National Labor Relations Board to enforce its order against Earl Latsha Lumber

Company, and by the Lumber Company to review and set aside the order. The order was entered upon the Board's finding that the Lumber Company had coercively interrogated employees and discharged one of them in the presence of the others because of his union activities, in violation of section 8(a)(1) of the National Labor Relations Act, and had discharged six other employees because of their union activities, in violation of that section and of section 8(a)(3) of the Act. The Lumber Company attacks the sufficiency of the evidence to support these findings. Our examination of the record, however, satisfies us that substantial evidence which the Board was entitled to, and did, credit supports the findings. We may not, therefore, set them aside.

The Lumber Company also raises the procedural objections that the Board refused to grant its motion for a more definite statement of the complaint, that the Board refused to grant its request for oral argument before the Board, and that the Board denied its motion for reconsideration, rehearing and reopening of the record based on a letter subsequently received from one of the complaining witnesses. We find each of these objections to be without merit as is the Lumber Company's motion in this court for an order permitting it to introduce before the Board the additional evidence of the witness in question.

The motion for leave to introduce additional evidence before the Board will be denied.

A decree enforcing the order of the Board will be entered.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,912

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

EARL LATSHA LUMBER COMPANY,
Respondent.

No. 15,960

EARL LATSHA LUMBER COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

DECREE

Before: Maris, McLaughlin and Kalodner, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Earl Latsha Lumber Company (No. 15,912) its officers, agents, successors, and assigns on August 12, 1965, and upon the petition of Earl Latsha Lumber Company (No. 15,960) to review and set aside said order. The Court heard argument of respective counsel on October 18, 1966, and has considered the briefs and transcript of record filed in this cause. On October 27, 1966, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Third Circuit that the said order of the Na-

tional Labor Relations Board in said proceeding be enforced, and that Earl Latsha Lumber Company, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

By THE COURT

MARIS

Circuit Judge

DATED: December 21, 1966

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. 151 *et seq.*) are as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in This Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining

unit covered by such agreement when made, . . . and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

* * * * *

"Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the

Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact is supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

The relevant provisions of the Fifth Amendment to the United States Constitution: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 15,960

EARL LATSHA LUMBER CO.,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR REVIEW OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

EARL LATSHA LUMBER CO., a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, files this Petition, pursuant to the provisions of Section 10 (f) of the Labor Management Relations Act of 1947 (61 Stat. 136; 29 U.S.C. §160 (f) for a review of the decision and order of the National Labor Relations Board, (hereinafter referred to as the "Board"), entered at Washington, D. C., August 12, 1965, which decision held that Earl Latsha Lumber Co. was guilty of certain unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act heretofore referred to.

In support of this Petition, Earl Latsha Lumber Co. respectfully shows:

I

JURISDICTION

Petitioner is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania; its principal office and place of business is 2300 Linglestown Road, P. O. Box 1725, Harrisburg, Susquehanna Township,

Dauphin County, Pennsylvania, where it is engaged in the business of the retail sale of lumber and building materials. All of the alleged acts which are the subject of these proceedings are alleged to have taken place at the premises of Petitioner's business heretofore described. This Court, therefore, has jurisdiction of this Petition by virtue of Section 10 (f) of the Labor-Management Relations Act of 1947.

II

STATEMENT OF PROCEEDING

Upon all proceedings had in said matter the Board on August 12, 1965, stated its Findings of Fact, Conclusions of Law, and issued a Decision and Order, copy of which is attached hereto, made a part hereof, and marked Exhibit "A". A petition for enforcement of the Order was filed by the Board before your Honorable Court on May 13, 1966. Paragraph 4 of that petition represents that the Board is certifying and filing with the Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceedings before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be entered, all of which is pursuant to Section 10 (e) of the National Labor Relations Act, as amended, and pursuant to Rule 18 (7) of this Court. By cross reference Petitioner incorporates that transcript when filed in these proceedings.

III

ASSIGNMENTS OF ERROR

Earl Latsha Lumber Co., as a basis for review, makes the following assignments of error, to wit:

1. The Board's decision and order are contrary to the law and are not supported by any substantial evidence.

2. The Board's findings of fact against Earl Latsha Lumber Co. are not supported by substantial evidence.

3. The Board's Findings as Conclusions of Fact and as Conclusions of Law the commission by Petitioner, Earl Latsha Lumber Co., of the unfair labor practices alleged in the Complaint are contrary to the law and without substantial evidence and against the evidence set forth in the record.

4. The Trial Examiner, Charles W. Schneider, and the Board erred in failing to find as facts those suggested facts submitted by Petitioner in its proposed Findings of Fact mailed as part of its brief (pages 14-18) March 1, 1965, and incorporated herein by reference thereto.

5. The Board and the Trial Examiner, Charles W. Schneider, by order dated January 7, 1965, erred in denying Petitioner's motion to strike.

6. The Board and the Trial Examiner, Charles W. Schneider, by order dated January 7, 1965, erred in denying Petitioner's motion for more definite statement.

7. The Board erred in denying Petitioner's request for oral argument since Petitioner was thereby deprived of an adequate opportunity to fully present its position.

IV

PRAYER

WHEREFORE, Petitioner prays for a review of the decision, findings and order of the National Labor Relations Board and that:

1. A copy of this Petition be served upon the National Labor Relations Board;

2. That the said decision, findings and order be in each and in all respects cancelled and set aside;

3. That Earl Latsha Lumber Co. shall have such other and further relief as may be just and proper in the premises.

KOHN, ADLER & ADLER

By /s/ LOUIS J. ADLER

Attorney for Earl Latsha Lumber Co.

125 Locust Street,
Harrisburg, Pennsylvania.

May 31, 1966.

EXHIBIT "A"

154 NLRB No. 30 D-8240 Harrisburg, Pa.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 4-CA-3448

EARL LATSHA LUMBER CO.

and

LOCAL 776, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA

DECISION AND ORDER

On June 2, 1965, Trial Examiner Arthur Christopher, Jr., issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel filed an answering brief in opposition to the Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs,[1] and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Earl Latsha Lumber Co., Harrisburg, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

1. Add the following at the end of paragraph 1(c) of the Trial Examiner's Recommended Order and at the end of the fifth indented paragraph in the Appendix attached to the Trial Examiner's Decision:

"... except to the extent that such right may be affected by an agreement requiring membership in a labor or-

---

[1] The Respondent's request for oral argument is hereby denied because the record, including the exceptions and briefs, adequately presents the issues and the positions of the parties.

[2] The Respondent excepts to an Order dated January 7, 1965, before the hearing, by Trial Examiner Charles W. Schneider, denying the Respondent's motions to strike subparagraph 5(c) of the complaint and for a more definite statement. As the complaint conformed with the requirements of Section 10(b) of the National Labor Relations Act, as amended, and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, revised January 1, 1965, we find no merit in this exception.

ganization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959."

2. Add the following as paragraph 2(b) to the Trial Examiner's Recommended Order, the present paragraph 2(b) and those subsequent thereto being consecutively relettered:

"(b) Notify the above-named employees if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces."

Dated, Washington, D. C. Aug. 12, 1965.

/s/ Frank W. McCulloch, Chairman
/s/ Gerald A. Brown, Member
/s/ Sam Zagoria, Member

(SEAL) NATIONAL LABER RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1137

EARL LATSHA LUMBER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 15-16) is reported at 368 F.2d 216. The findings of fact, conclusions of law and order of the Board (J.A. 2a-28a)[1] are reported at 154 NLRB 429.

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[1] "J.A." refers to the Joint Appendix filed in the court below.

JURISDICTION

The decree of the court of appeals was entered on December 21, 1966 (Pet. 17). The petition for a writ of certiorari was filed on March 10, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that petitioner threatened and interrogated its employees and discharged six of them because of their union activities, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

2. Whether, in the circumstances of this case, the Board denied petitioner due process of law by refusing to hear oral argument.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pages 19-21 of the petition.

STATEMENT

A. The Board's Findings of Fact

On September 13, 1964,[2] Willis Weaver, who had been employed 10 years in petitioner's lumber yard

[2] All dates are in 1964.

business, discussed organizing petitioner's 30 employees with an officer of the Union[3] (J.A. 8a; 58a, 63a-64a, 159a, 163a). Weaver obtained blank union authorization cards, signed one himself, and took the remainder to work with him on the following day (J.A. 8a; 64a). There he signed up Elwood Dietz, who had been employed by petitioner for about 3 years (J.A. 8a; 56a). Dietz in turn agreed to help organize the other employees and by September 16 had obtained 6 more signed union cards; all but one were signed in petitioner's lumber yard (J.A. 8a; 56a-57a, 64a).

On the morning of September 17, petitioner's president, Earl Latsha, assembled about 25 employees in the office as they arrived for work and delivered a speech (J.A. 8a-9a; 57a-58a, 70a, 80a-81a, 90a-91a). Latsha first asserted that petitioner had to begin paying the employees time and a half for overtime,[4] that he did not intend to borrow money to pay the customary bonuses, and that the employees would be harmed by the overtime pay requirement (J.A. 8a-9a; 58a, 71a, 82a, 91a). Latsha then proceeded to the "union subject", stating that he had heard rumors

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[3] Local 776, International Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers of America.

[4] About the beginning of September, an auditor from the Wage and Hour Division of the Department of Labor began an inspection of petitioner's records to determine petitioner's liability for overtime pay under the Fair Labor Standards Act. Though the auditor advised Latsha not to commence such payments until the audit was completed (about two months later), Latsha decided shortly before the September 17 meeting to begin immediately. (J.A. 17a; 100a, 111a-112a.)

that someone was trying to unionize the lumber yard and that he would not tolerate it. Latsha added that he had enough money to live on without operating the yard and would close it down before permitting a union to come in. (J.A. 8a-10a; 58a, 71a, 82a, 91a.) Latsha singled out Elwood Dietz as the "S. B. who started this thing" (J.A. 71a; 9a) and directed him to punch out. When Dietz asked why he was being fired, Latsha replied that Dietz would get a reason later. (J.A. 9a; 58a, 71a, 82a, 91a, 98a.) Latsha added that he could run the Company with four men if necessary (J.A. 9a-10a; 71a).

After the meeting, Dietz again asked Latsha why he was being discharged. Latsha replied that Dietz was "one of the instigators of this thing" and added, "there's another one too," as he pulled the time cards of Dietz and of a second employee. Latsha said they could get their checks whenever the office girls came in (J.A. 10a; 59a-60a). Before Dietz left the office, Latsha asked him for the names of all employees who had signed union cards but Dietz refused (J.A. 10a; 60a).

Within hours of Dietz's discharge, Latsha also interrogated and discharged five of the six remaining union adherents[5] under the following circumstances.

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[5] As indicated *supra*, p. 3, a total of eight employees signed union cards between September 13 and 16. Six (including Elwood Dietz) were discharged on September 17, the seventh repudiated his designation on the morning of the meeting, and the eighth was interrogated about two days after the meeting but was not discharged (J.A. 15a-16a; 147a, 149a).

Donald Reichenbach, who had worked more than two years for petitioner as a yardman and had signed a union card on September 14, was summoned to the office. There he was told by Earl Latsha's brother, Lee, that Earl had instructed him to obtain his time card and punch out. (J.A. 11a; 79a, 83a.) Minutes later Earl Latsha returned to the office and asked Reichenbach whether he knew who had signed union cards and whether he had signed one. Reichenbach replied that he did not know of others but that he had signed one. Whereupon Latsha said, "OK, get your time card, go up and get your check; you are done." (J.A. 11a; 83a-84a.)

Owen Gephart was a truckdriver who had worked five years for petitioner and had signed a union card on September 14 (J.A. 11a; 69a-70a). Immediately after the September 17 meeting, he made a delivery, and, upon his return to the office, was told by Earl Latsha, "You are fired; punch your time card" (J.A. 11a-12a; 72a). Latsha then repeatedly asked Gephart whether he had signed a union card but Gephart denied it. Latsha also asked Gephart which of the other employees had signed cards but Gephart said he did not know. Finally, when Latsha told Gephart that he had learned from Gephart's wife that Gephart had signed a card, the latter admitted he had (J.A. 12a; 72a-73a). Outside in the yard, Latsha again unsuccessfully asked Gephart who else had signed union cards. He also asked why Gephart had tried "to get a union in for anyhow" and told Gephart he "was one of my best men * * *; I can't under-

stand why you would go and do something like [that]." (J.A. 12a-13a; 74a.) Lee Latsha tried to secure Gephart's reemployment but Earl refused (J.A. 13a; 75a-76a).

Clair Swartz had worked eight years as a lift operator for the Company and had signed a union card on September 14 or 15 (J.A. 13a; 88a-89a). About 45 minutes after the meeting, Earl Latsha approached Swartz in the warehouse and asked if he had signed a union card. When Swartz admitted his signing, Latsha said, "All right, shut the lift off, go down and get your check." (J.A. 14a; 91a-92a.)

Bright Dietz had worked for the Company about nine months and had signed a union card on September 16 (J.A. 14a; 96a-97a). About two hours after his speech, Earl Latsha approached Bright Dietz at the latter's work station and asked Dietz if he had signed a union card. When Dietz acknowledged his signing, Latsha said, "You're done * * *." (J.A. 14a; 98a). Truckdriver John Perry, who was present, asked Latsha if he would keep Dietz since Dietz was a good worker. Latsha replied that Dietz "would have to go now." Dietz was rehired within a week. (J.A. 14a-15a; 98a-99a.)

Willis Weaver, as indicated (*supra*, pp. 2-3), had worked ten years for the Company and had initiated the union organizational campaign. After the meeting, Latsha directed someone behind the counter in the office to "[p]ull Weaver's card; he's going too; he's one of the main leaders" (J.A. 12a; 73a). Shortly thereafter, two employees informed Weaver, who

was at home because of illness, that Earl Latsha had discharged him. Later in the day, the Company office clerk brought Weaver his check and a letter from the Company which simply stated, "We no longer need your services." (J.A. 15a; 65a.)

Petitioner's president, Earl Latsha, testified at the hearing that the discharges were economically necessary because of overtime pay requirements (*supra*, p. 3, n. 4), and that the foregoing employees were selected for discharge for such reasons as inefficiency, customer complaints, refusal to work on Saturdays, and jobs on the side (J.A. 16a-19a; 100a-105a).[6] However, the dischargees had never been individually warned about poor work performance, and Earl Latsha did not consult with any other management representative or supervisor before terminating them (J.A. 17a, 18a; 124a).

B. The Decisions of the Board and of the Court of Appeals

Upon the foregoing facts, the Board found that petitioner had violated Section 8(a)(1) of the Act by threatening to close its lumber yard if the employees chose to unionize, by discharging Elwood Dietz in the presence of other employees because of his union activities, and by coercively interrogating employees about their signing of union cards (J.A. 21a, 23a-24a). The Board further found that petitioner had violated Section 8(a)(3) and (1) of the Act by dis-

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[6] Latsha assigned no particular reason for the discharge of Bright Dietz (J.A. 19a).

charging the six employees discussed above for their union activities (J.A. 20a-21a, 23a). The Board's order directed petitioner to cease and desist from the unfair labor practices found, to reinstate those discriminated against with back pay,[7] and to post appropriate notices (J.A. 3a-4a, 24a-26a).

The court of appeals found that "substantial evidence which the Board was entitled to, and did, credit supports the [Board's] findings," and it therefore enforced the Board's order (Pet. 16).

ARGUMENT

1. Petitioner's attack (Pet. 9-14) upon the credibility of the employee witnesses and the sufficiency of the evidence supporting the violations found by the Board merely raises a substantial evidence question, which does not warrant further review by this Court. See *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U.S. 498, 502-503. In any event, the facts summarized in the statement clearly demonstrate, as the court below held (Pet. 16), the propriety of the Board's findings that petitioner threatened, coercively interrogated, and discharged six employees for engaging in union activities, in violation of Section 8(a)(1) and (3) of the Act.

2. Nor did the Board abridge petitioner's constitutional right to a fair hearing by refusing to hear oral

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[7] Since petitioner had retired Bright Dietz, the Board's order as to him required only reimbursement for loss of pay resulting from his discriminatory discharge (J.A. 22a, 25a).

argument (Pet. 6-9).[8] As this Court has held, "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights." *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 351. In proceedings like the one involved here, "Argument may be oral or written." *Morgan* v. *United States*, 298 U.S. 468, 481; accord, *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 281-284. Petitioner had a full hearing before the Trial Examiner, including oral argument (J.A. 6a; Pet. 8), and thereafter presented written exceptions and a brief to the Board (J.A. 34a-40a). The Board, in turn, considered the entire record, including petitioner's exceptions and brief, and found that the "issues and positions of the parties" were "adequately present[ed]" (J.A. 3a). Under these circumstances, as the court below held (Pet. 16), the Board was not constitutionally required to also hear oral argument. See *National Labor Relations Board* v. *Clausen*, 188 F. 2d 439, 444 (C.A. 3), certiorari denied, 342 U.S. 868; *National Labor Relations Board* v. *Allied Distributing Corp.*, 297 F. 2d 679 (C.A. 10).[9]

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[8] Section 10(c) of the Act provides that after the testimony taken by the Trial Examiner is filed with the Board, "in its discretion, the Board upon notice may take further testimony or hear argument."

[9] And as court stated in the last cited case above (297 F. 2d at 680-681): "*Londoner* v. *Denver*, 210 U.S. 373 [upon which petitioner relies, see Pet. 6], is not in point. That case involved tax assessment proceedings in which the objectors were not given an opportunity to be heard other than by the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MALCOLM D. SCHULTZ,
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National Labor Relations Board.

APRIL 1967

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submission of their objections in writing and there was no right of court review. In the instant case there was a full hearing before the examiner, review of his report by the Board upon exceptions and briefs, and * * * enforcement proceedings in [the] court [of appeals]."

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